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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF THRIFT SUPERVISION, PETITIONER

v.

ROBERT D. RAPAPORT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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13 pp

TABLE OF AUTHORITIES

Cases:	Page
Akin v. *OTS*, 950 F.2d 1180 (5th Cir. 1992)	3, 4, 5
Bailey v. *United States*, No. 94-7448 (Dec. 6, 1995)	2
Cavallari v. *Office of Comptroller of the Curency*, 57 F.3d 137 (2d Cir. 1995)	4
Field v. *Mans*, 116 S. Ct. 437 (1995)	2
Firstcorp, Inc., In re, 973 F.2d 243 (4th Cir. 1992)	10
Good Samaritan Hosp. v. *Shalala*, 113 S. Ct. 2151 (1993)	5
Groos Nat'l Bank v. *Comptroller of the Currency*, 573 F.2d 889 (5th Cir. 1978)	9
Lebron v. *National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995)	8
Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963)	7
Simpson v. *OTS*, 29 F.3d 1418 (9th Cir. 1994), cert. denied, 115 S. Ct. 1096 (1995)	4
Stevens v. *Department of Treasury*, 500 U.S. 1 (1991)	8
United States v. *Williams*, 504 U.S. 36 (1992)	8
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)	5-6
Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991)	8
Wachtel v. *OTS*, 982 F.2d 581 (D.C. Cir. 1993)	8
Statutes:	
11 U.S.C. 365(*o*)	10
11 U.S.C. 507(a)(9)	10
12 U.S.C. 1464(d)(1)(A)	9
12 U.S.C. 1813(u)	3
12 U.S.C. 1813(w)(5)	3

Statutes—Continued: Page

12 U.S.C. 1817(j)(8)(B) 3
12 U.S.C. 1818(b) 2, 4, 5, 7, 9
12 U.S.C. 1818(b)(1) 3, 6, 7, 8, 9, 10
12 U.S.C. 1818(b)(6) 3, 6, 7, 8
12 U.S.C. 1818(b)(6)(A) 4, 7, 8
12 U.S.C. 1818(b)(6)(A)(i) 1, 3, 6
12 U.S.C. 1831*o*(e) 10
12 U.S.C. 1841(a)(2)(A) 3

Miscellaneous:

S. Rep. No. 1482, 89th Cong., 2d Sess. (1966) 9

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1. The OTS's consistent position has been that a financial institution insider is "unjustly enriched" within the meaning of 12 U.S.C. 1818(b)(6)(A)(i) when he enters into a written agreement with federal bank regulators *in exchange for some valuable regulatory benefit*, and then—having received and retained that benefit—fails to abide by his side of the bargain. See, *e.g.*, Pet. App. 66a & n.29. That interpretation is consistent with traditional equitable principles of "unjust enrichment." See Pet. 14 n.2. If it diverges from those principles, it does so only with respect to the statutory remedy, which the OTS has reasonably concluded may be measured by the amount that a defaulting insider promised to pay in exchange for

a valuable, but not easily valued, regulatory benefit. As the petition argues (see Pet. 14-15), that conclusion is supported both by the other terms that Congress used in the same provision, and by the overall structure and purpose of Section 1818(b).[1]

Respondent makes little effort to answer our arguments (Pet. 8-15) that the OTS has reasonably interpreted the statutory phrase "unjustly enriched" to cover situations like his. He argues primarily that, if the agency's interpretation is correct, "the term 'unjustly enriched' * * * will have no meaning whatsoever, since every dispute involving a failure to pay money would then be a candidate for an administrative resolution." Br. in Opp. 3; see also *id.* at 5-6, 10-11 & n.4. That argument rests on respondent's incorrect assertion that, in the OTS's view, "fail[ure] to make a monetary payment under the terms of a net worth maintenance agreement * * *, *by itself*, constitute[s] unjust enrichment." Br. in Opp. 2 (emphasis added). The OTS, however, has argued only that an insider like respondent is "unjustly enriched" if he (i) refuses to pay money in violation of a previous agreement, (ii) *after receiving*, in exchange for that agreement, *a valuable benefit*—the provision of federal deposit insurance to his new savings institution—that cannot be either returned or readily valued. That position does not deprive the term "unjustly enriched" of

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[1] This Court recently reiterated the general proposition that Congress may be presumed to have intended to adopt a common-law understanding of undefined statutory terms, "unless the statute otherwise dictates." *Field* v. *Mans*, 116 S. Ct. 437, 443 (1995). A statute may "otherwise dictate[]," not only through an explicit statutory definition, but by inference from a word or phrase's "placement and purpose in the statutory scheme," because "[t]he meaning of statutory language, plain or not, depends on context." *Bailey* v. *United States*, No. 94-7448 (Dec. 6, 1995), slip op. 8.

any meaning, or sanction the use of orders under Section 1818(b)(6) to resolve every monetary dispute.

2. Respondent argues (Br. in Opp. 4, 7-8) that the decision in this case does not conflict with the Fifth Circuit's decision in *Akin* v. *OTS*, 950 F.2d 1180 (1992), because the facts of the two cases are not precisely the same. Respondent contends, for example, that Akin controlled the institution whose net worth he promised to maintain, whereas respondent, although he owned 70% of the stock of Great Life Savings Association (Great Life), "did not control" it. Br. in Opp. 4. That contention is not only factually questionable, see Pet. App. 57a n.23, but legally irrelevant. Both Akin and respondent owned more than 25% of the voting stock of their respective institutions, and both were therefore "institution-affiliated part[ies]" subject to the banking agencies' cease-and-desist jurisdiction under 12 U.S.C. 1818(b)(1). See 12 U.S.C. 1813(u) and (w)(5), 1817(j)(8)(B), 1841(a)(2)(A). Nothing in *Akin* indicates that the court there relied on the details of Akin's position in concluding that he was "unjustly enriched," within the meaning of Section 1818(b)(6)(A)(i), by breaching his agreement to maintain the net worth of his institution, or that the Fifth Circuit would have thought this case distinguishable from *Akin* on any such basis. See also Pet. App. 67a n.30.

Respondent also argues that Akin "derived an immediate personal benefit from the [OTS's] forbearance from pursuing a cease-and-desist action that threatened [Akin's] control" over his institution, whereas respondent "did not receive any personal benefit" in return for his agreement to maintain Great Life's net worth. Br. in Opp. 4; see *id.* at 8. Here, however, just as in *Akin*, respondent clearly received something of value in exchange for the net worth maintenance commitment he later breached. Respondent sought federal deposit insur-

ance for a new savings association, in which he planned to be the majority investor. Pet. App. 36a. Federal banking authorities made insurance available, but only on the condition that respondent personally agree to maintain the new association's capital for five years. *Id.* at 2a. Respondent was enriched when his new business received the federal insurance that allowed it to begin operating, so that respondent could earn a return on his investment. His enrichment became "unjust" when he refused to honor his capital maintenance agreement, on which the provision of federal insurance had been explicitly predicated. Those facts do not distinguish this case from *Akin*. See 950 F.2d at 1184.

The decision below also conflicts with *Akin* as to the permissible measure of recovery under Section 1818(b)(6)(A). See Br. in Opp. 8. In this case, as in *Akin*, the OTS concluded that when an insider retains money that he promised to dedicate to the support of his institution or its creditors (including the federal deposit insurance fund), the amount promised but unpaid is one fair measure of the amount by which he has been "unjustly enriched" within the meaning of the statute. Pet. App. 65a-67a. The court in *Akin* accepted that contention, and affirmed "in all respects" an order entered on that basis. 950 F.2d at 1184, 1186. See also *Cavallari* v. *Office of Comptroller of the Currency*, 57 F.3d 137, 144 (2d Cir. 1995); *Simpson* v. *OTS*, 29 F.3d 1418, 1425-1426 (9th Cir. 1994), cert. denied, 115 S. Ct. 1096 (1995). There is no merit to respondent's suggestion (Br. in Opp. 8) that the Fifth Circuit did not decide the remedial issue, or that the matter is not ripe for resolution by this Court.

3. Respondent only briefly defends (Br. in Opp. 11-12) the court of appeals' holding that it owed no deference to the OTS's interpretation of Section 1818(b). Respondent

argues primarily (Br. in Opp. 9-15) that that holding is irrelevant here, because the statutory language at issue is "clear and unambiguous" (*id.* at 9).[2] As both the petition (at 8-17) and the conflicting decisions in this case and in *Akin* (see 950 F.2d at 1183-1184) demonstrate, however, the proper application of Section 1818(b) to the facts of this case is a matter over which reasonable minds can and do differ. It is in precisely such situations that deference to an administrative agency's interpretation is required. See, *e.g.*, *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2159-2162 (1993).

In addition, the court of appeals' refusal to accord any deference to the OTS's statutory interpretations conflicts with the practice of other courts of appeals. See Pet. 21. Respondent argues (Br. in Opp. 12-14) that there is nevertheless no conflict because the courts that have deferred to administrative interpretations in this context have not discussed the position adopted by the court of appeals in this case. The fact that other courts have not explicitly rejected the D.C. Circuit's novel argument for refusing deference does not, however, resolve the conflict or lessen the importance of the error below. The importance of that error is, moreover, magnified by the fact that it was made by the court in which "the vast majority of challenges to administrative agency action are brought." *Vermont Yankee Nuclear Power Corp.* v.

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[2] Respondent suggests (Br. in Opp. 10-11) that the court of appeals would have proceeded in the same manner, and reached the same result, whether or not it thought that the OTS's interpretations were entitled to deference. Only Judge Rogers' concurrence, however, took that position. Pet. App. 24a. The panel majority dealt with the question of deference as a threshold matter (see *id.* at 10a), and explicitly held that, because it owed "no * * * deference" to the agency's interpretation (*ibid.*), it would "proceed de novo" (*id.* at 11a).

Natural Resources Defense Council, Inc., 435 U.S. 519, 537 n.14 (1978).

4. Respondent dismisses the OTS's argument that its order in this case should be upheld without regard to the "unjustly enriched" language of Section 1818(b)(6)(A)(i) (see Pet. 15-18) as "linguistic sleight of hand." Br. in Opp. 16. As the petition points out (at 16), however, Section 1818(b)(6) relates only to orders that go beyond the agency's core cease-and-desist authority and order a party "*further*, to take affirmative action to correct the conditions resulting from any * * * violation or practice." 12 U.S.C. 1818(b)(1) (emphasis added). The order at issue in this case did not need to rely on that "affirmative action" authority.

Section 1818(b)(1) gives the OTS the authority to order a party to "cease and desist from [a] * * * violation" of a "condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution" or of a "written agreement entered into with the agency." Respondent's failure to honor his net worth maintenance agreement violated both a condition imposed in writing and a written agreement. Thus, whatever limitations subsection (b)(6) may place on agency orders that require insiders to take additional "affirmative action" to correct the "conditions resulting from" their violations, those limitations do not apply to the order issued to respondent, which simply required him to cease and desist from the violation itself.

Respondent attacks our argument as "a play on words" (Br. in Opp. 17), because an order to stop violating an agreement to pay money is, in effect, an order to pay the money owed. Respondent argues that such an order is therefore an order to take "affirmative action," subject to the limitations of subsection (b)(6). Precisely

the same objection could be made, however, to any cease-and-desist order that directs a party to take some positive action necessary to comply with a statute or regulation, safe banking practice, or a written condition or agreement. Treating all such orders as orders requiring "further * * * affirmative action" would disserve Congress's intent in creating the broad cease-and-desist authority conferred by Section 1818(b)(1). Compare Br. in Opp. 17 with *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 311-312 & n.17 (1963) (agency's "cease and desist" authority included power to compel divestiture).

Our interpretation of the banking agencies' core cease-and-desist authority does not render the "affirmative action" provisions of the statute "meaningless." Br. in Opp. 18. Where, as here, an insider has reneged on an express written agreement to pay money, he will have violated that agreement, which may be enforced under the agency's core cease-and-desist powers. Typically, he will also have damaged the institution and been "unjustly enriched" under Section 1818(b)(6)(A). In cases involving no written condition or agreement calling for the payment of money, however, an order to desist from the violation would not itself entail any remedial payment. In such cases, the agency could generally order such a payment only as a matter of "affirmative relief," subject to the limits of subsection (b)(6).

Respondent contends (Br. in Opp. 18-23) that the OTS waived any argument based on its core cease-and-desist authority by failing to raise that argument before the court of appeals in this case. The argument does not, however, present a "new claim" in this case; it is, rather, "a new argument to support * * * [the OTS's] consistent claim" that it has the authority under Section 1818(b) to order respondent to comply with his net worth

maintenance agreement. *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995). There would, in addition, have been no point in raising the argument before the D.C. Circuit, which had already made clear, in *Wachtel* v. *OTS*, 982 F.2d 581, 586 (1993) (emphasis added), its broad and unqualified position that "the government *simply cannot make a monetary claim* against [an institutional insider] under § 1818 without meeting the prerequisites of § 1818(b)(6)(A)."[3] See *Lebron*, 115 S. Ct. at 965; *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992).

The decision below explicitly reaffirms *Wachtel*'s holding that, in order to issue an order of the sort involved here, the OTS "must show" that the facts of the case satisfy one of the conditions set out in Section 1818(b)(6)(A). Pet. App. 9a; see also *id.* at 19a ("The OTS has the authority * * * to enforce a capital maintenance or other agreement in an administrative proceeding only against a party who has either been unjustly enriched or has acted with reckless disregard for some aspect of federal regulation."). The court of appeals has thus twice "expressly decided" the first question stated in the petition, and that question is properly presented in this case. See *United States* v. *Williams*, *supra*; *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991).

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[3] In *Wachtel*, the OTS argued broadly that Section 1818(b)(1) "expressly provides that the Director may enforce written conditions imposed in connection with approval of an application." 91-1580 OTS Br. 42 (D.C. Cir.). The agency argued that an order requiring compliance with a net worth maintenance agreement could be entered in reliance solely on Section 1818(b)(1), without regard to subsection (b)(6). See, *e.g.*, 91-1580 OTS Br. 48. The court of appeals squarely rejected that claim.

5. Finally, respondent argues (Br. in Opp. 4-7) that this case does not warrant this Court's review because the decision below will not preclude federal bank regulators from enforcing net worth maintenance agreements in actions for contract damages. Although the OTS has the general authority to sue in federal court, see 12 U.S.C. 1464(d)(1)(A), the "condition[s] imposed in writing" and "written agreement[s]" that Congress intended to be administratively enforceable through Section 1818(b)(1) will not necessarily be enforceable as contracts under state or federal common law. See cases cited at Br. in Opp. 5; see also *Groos Nat'l Bank* v. *Comptroller of the Currency*, 573 F.2d 889 (5th Cir. 1978). Even where contract actions are possible, respondent's reading of the statute would seriously compromise the strong federal interest in prompt and appropriate administrative remedies that initially motivated the enactment of Section 1818(b)'s cease-and-desist authority. See, *e.g.*, S. Rep. No. 1482, 89th Cong., 2d Sess. 5 (1966) ("Experience has often demonstrated that the remedies now available to the Federal supervisory agencies are * * * too cumbersome to bring about prompt correction and promptness is very often vitally important.").

The adverse effects of the decision below are important. As the petition notes (at 23), a significant number of net worth maintenance agreements are outstanding, and additional agreements of this kind may be entered into in the future. Nor is the decision below limited either to those agreements or to the OTS. Every subject of an agency action under Section 1818(b) may seek review in the D.C. Circuit, and the decision below therefore affects all four federal banking agencies. Moreover, Section 1818(b) controls the administrative enforcement of all regulatory conditions "imposed in writing" by, and all "written agreements" with, any of

those agencies. Thus, as discussed in the petition (at 24), the decision below inappropriately restricts the remedial options open to all four federal banking agencies in cases in which an institution-affiliated party has violated a written agreement imposing obligations beyond those created by statute, regulation, or prior agency order.

Congress has made clear that it considers the administrative use and enforcement of written conditions and agreements, including net worth maintenance agreements, to be an important part of the regulatory system. See 12 U.S.C. 1818(b)(1) (providing for enforcement); 11 U.S.C. 365(*o*) and 507(a)(9) (making special provision for the enforcement of net worth maintenance agreements in bankruptcy); see also *In re Firstcorp, Inc.*, 973 F.2d 243 (4th Cir. 1992); cf. 12 U.S.C. 1831o(e) (providing for the use and enforcement of "capital restoration plans" for undercapitalized institutions). The decision below places unjustifiable limits on the ability of federal regulators to enforce such written obligations.

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For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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